11-1700-9528-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF HUMAN RIGHTS

Alison Moffat,

Complainant,

v.

Hennepin County,

Respondent.

ORDER REGARDING COUNTY'S MOTION FOR SUMMARY JUDGMENT AND/OR DIRECTED VERDICT

The above-entitled matter came on for hearing before Administrative Law Judge Barbara L. Neilson on June 12, 1996, at the Office of Administrative Hearings in Minneapolis, Minnesota, and continued over a period of 21 days until August 13, 1996. At the close of Complainant's case in chief, Respondent brought a motion for summary judgment and/or directed verdict based on the doctrines of official and discretionary immunity. The record closed on October 9, 1996, when oral argument on Respondent's motion was heard.

Janeen E. Rosas, Jessica Hughes, and Beverly Wolf, Assistant Hennepin County Attorneys, 2000 Hennepin County Government Center, Minneapolis, Minnesota 55487, appeared on behalf of the Hennepin County ("Respondent"). Marcia S. Rowland, Attorney at Law, Standke, Greene & Greenstein, Ltd., 17717 Highway 7, Minnetonka, Minnesota, 55345, appeared on behalf of Alison Moffat ("Complainant").

Based upon all of the files, records, and proceedings herein, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED:

1. That Respondent's motion for summary judgment and/or directed verdict based on official and statutory (discretionary) immunity is GRANTED.

2. That Complainant's complaint is dismissed in its entirety and with prejudice.

Dated this 12th day of November, 1996.

BARBARA L. NEILSON

Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. § 363.071, subd. 2 and 3, this Order is the final decision in this case. Under Minn. Stat. § 363.072, the Commissioner of the Department of Human Rights or any person aggrieved by this decision may seek judicial review pursuant to Minn. Stat. §§ 14.63 to 14.69.

MEMORANDUM

This case involves a disability discrimination claim brought pursuant to the Minnesota Human Rights Act against Hennepin County. The Complainant, Ms. Alison Moffat, has been diagnosed as having dyslexia and other learning disabilities. Ms. Moffat maintains that Hennepin County failed to reasonably accommodate her disability during an employment application exam. Specifically, Ms. Moffat claims that Hennepin County should have provided her with a reader for the exam, or allowed her to participate in the alternative selection process known as the 640 Hour Program. A contested case hearing was held in this matter beginning June 12, 1996 and lasted over the course of 21 days. At the close of Complainant's case in chief, Respondent brought a motion for summary judgment or, in the alternative, directed verdict based on the doctrines of official and statutory (discretionary) immunity. The County had raised its immunity defense it its Answer and Amended Answer and informed the Judge and opposing counsel just prior to the start of the hearing of its intention to move for a directed verdict on the grounds of immunity.

I. Factual Overview

Alison Moffat is a 25-year-old woman who suffers from certain learning disabilities including dyslexia, dysgraphia and dysnomia. Ms. Moffat received special education services from the fourth grade through her graduation from high school due to her learning disabilities. These services included the ability to contact her special education teacher daily to have assignments explained, obtain help in proofreading papers, receive assistance with assignments, and have papers or tests read to her.

Ms. Moffat was employed by Hennepin County as a temporary or intermittent employee from January 8, 1990, to June 26, 1992, and again from February 8, 1993, to October, 1994. She worked in the Accounts Payable Department of Hennepin County Medical Center as a temporary account clerk during these periods. As a temporary or intermittent employee, Ms. Moffat was not required to take a civil service test to be hired in the position. Ms. Moffat performed this job satisfactorily and received positive evaluations from her supervisors. In 1991, Ms. Moffat submitted an application for the account clerk classification. She failed the account clerk test which the County required applicants to take.

In July of 1993, Hennepin County posted a notice that a county-wide list was being created for the job of account clerk. Ms. Moffat submitted an application on July 21, 1993, and indicated on the application that she required special testing accommodations to accommodate a disability. Ms. Moffat wrote that she would need "longer time and someone to read parts of the test." (Ex. 9.) Nancy Skilling, an

industrial/organizational psychologist[1] employed by Hennepin County's Human Resources Department, considered Ms. Moffat's request for accommodations. Ms. Skilling's duties with Hennepin County primarily involve the development of employee selection measures. Her responsibilities include conducting job studies or analyses (studying people in jobs to determine the necessary knowledge, skills, abilities, and personal characteristics required to be successful in performing a particular job), using that information to develop and revise tests, monitoring the progress of those tests, and evaluating and ruling upon requests for testing accommodations. Ms. Skilling conducted job analyses and developed the tests that were used by Hennepin County for the account clerk classification in 1993 and 1994.[2]

After she became aware in late July or early August, 1993, of Ms. Moffat's request for accommodation, Ms. Skilling asked for additional information from Ms. Moffat and proceeded to assess her accommodation request in the context of the exam. The high school records provided to Ms. Skilling included a report from Dr. James C. Crewe, a school psychologist, regarding a WAIS-R Analysis that he had administered to Ms. Moffat on February 2, 1989. In this report, Dr. Crewe noted the 27-point difference between Ms. Moffat's verbal scale IQ and her performance scale IQ and stated that "the following clinical hypotheses are linked to this type of verbal performance discrepancy: A. Performance skills better developed than verbal skills. B. Visual nonverbal mode better developed than auditory processing mode. C. Possible difficulty with reading. D. Possible language deficit. E. Possible limitations in auditory conceptual skills." (Ex. 17.) The records provided also referred to an "IEP" (Individual Education Plan). Ms. Skilling did not know what an "IEP" was at that time and was not sure why psychological reports were included among Ms. Moffat's school records. After reviewing the materials, Ms. Skilling felt that she could see some evidence of an impairment but did not know what Ms. Moffat's disability was. Ms. Skilling decided that she needed to talk to Ricki Roberts, Ms. Moffat's high school special education teacher.

Ms. Skilling and Ms. Roberts talked on the telephone on approximately August 9 or August 10, 1993. Ms. Roberts explained that she was Ms. Moffat's learning disability teacher from high school. Ms. Skilling told Ms. Roberts that Complainant had applied for the account clerk test. Ms. Skilling described the sections of the test to Ms. Roberts and told her that she would need more specific information about the impact of Ms. Moffat's disability on the account clerk test. Ms. Skilling explained that she was not familiar with specific learning disabilities such as dyslexia and indicated that she needed more information regarding the test accommodation. Ms. Roberts expressed frustration because she had previously sent information to the County regarding Complainant and it appeared that the materials had been lost in the County's Human Resources Department. Ms. Roberts informed Ms. Skilling that Complainant had a high level of intelligence but suffered from dyslexia, a reading disability. Ms. Roberts told Ms. Skilling that tests had been read to Complainant in high school and that Complainant had been given extra time and a separate room for tests. Ms. Roberts indicated that Complainant had problems with reading but not with math, and said that Ms. Moffat shouldn't have any problem with the numerical portions of the test. Ms. Roberts suggested that the other portions of the test be read to Complainant.

After reviewing the high school records pertaining to Complainant and talking with Ricki Roberts, Ms. Skilling felt that she had sufficient information to make a decision regarding what, if any, test accommodations should be made for Ms. Moffat. Ms. Skilling spent at least two hours over a few days making this decision, and twice consulted with the other two psychologists in Hennepin County's Human Resources Department. Ms. Skilling decided that Ms. Moffat would be given extra (double) time for the test and a separate room in which to take the test, and that the instructions for the individual parts of the test would be read to her. Ms. Skilling refused Complainant's request to have the test items themselves read to her. Ms. Skilling determined, based on her discussion with Ms. Roberts, that it would be unnecessary to read the math computation and numerical proofing sections of the test to Ms. Moffat in any event because Ms. Roberts said that Ms. Moffat shouldn't have any problem with the numerical sections of the test. Ms. Skilling denied Ms. Moffat's request that the individual test items on the other sections of the test **(**alphabetical filing, name and number comparison, and bookkeeping terminology) be read to her because the test measured the test-taker's ability to read. Ms. Skilling did not believe that reading the test items to Complainant would be a reasonable testing accommodation based on her view that the written test examines the applicant's ability to visually interpret and process written material by proofing, alphabetizing, etc., and her conclusion that reading the items to Ms. Moffat would compromise the integrity and validity of the test. Complainant took the test on or before August 20, 1993. She passed the test with a score of 71 out of 99 and was placed on the eligible list along with 96 other persons who had passed. Complainant did not score high enough to be hired for a permanent account clerk position.

In 1994, Hennepin County posted notice that it was creating a new eligible list for the account clerk position. Complainant submitted an application on or about February 2, 1994. However, Complainant failed to show up for the exam which took place on March 11, 1994. Sometime after March 11, 1994, Penny Schmahl, Ms. Moffat's supervisor, contacted Jim Ramnaraine, the County's Americans with Disabilities Act ("ADA") Coordinator, to discuss whether the County's 640 Hour Program might be utilized for Ms. Moffat. The 640 Hour Program is an alternative selection procedure applied by the County in instances where a reasonable accommodation cannot be made in a testing situation due to the nature of the applicant's disability. The 640 Hour Program permits an on-the-job trial period of up to 640 hours to be substituted for the usual examination. During the trial period, the applicant's ability to perform the work is evaluated. If the applicant is able to perform the work, the applicant's name is certified to the appointing authority and the applicant may be hired and begin his or her probationary period. Hennepin County Human Resources Rules, § 6.8(b) (Ex. 21.) The 640 Hour Program is used by the County only for applicants who are so severely disabled they cannot test, even with accommodations. It has been used in the past for applicants who are severely and persistently mentally ill or suffer from severe vision or hearing disabilities. During Ms. Schmahl's initial conversation with Mr. Ramnaraine, he indicated that it might be possible for Ms. Moffat to use the 640 Hour Program. However, Mr. Ramnaraine changed his attitude in a later conversation with Ms. Schmahl and indicated that it did not sound like the program would work for Ms. Moffat. During the second conversation, Mr. Ramnaraine asked whether Ms. Moffat had been engaged to Ms. Schmahl's son.

Mr. Ramnaraine did not have authority while working in the Compliance and Diversity Department or in the Human Resources Department to make decisions regarding eligibility for the 640 Hour Program. Decisions regarding eligibility for the 640 Hour Program are made by Ms. Skilling and the two other psychologists employed by the County. Mr. Ramnaraine was available as a resource to employees, applicants, and managers in the County to obtain information regarding disabilities and possible accommodations, and he served as a liaison with various state agencies. Mr. Ramnaraine also was responsible for conducting training of supervisors regarding requirements of the Americans with Disabilities Act ("ADA").

On April 5, 1994, Ms. Skilling received an e-mail message from Mr. Ramnaraine indicating that Ms. Schmahl had inquired about the use of the Hennepin County 640 Hour Program for Ms. Moffat. (Ex. 13.) On April 6, 1994, Ms. Skilling, Mr. Ramnaraine, and Marcia Ostby (Human Resources Representative and clerical recruiter), held a meeting with Raphael Viscasillas (the Assistant Director in the Human Resources Department). The purpose of meeting was to obtain Mr. Viscasillas' point of view on using the 640 Hour Program more frequently. That was the position that Ms. Skilling and the others attending the meeting were advocating. Ms. Ostby and Mr. Ramnaraine had drafted a preliminary set of guidelines to use in administering the 640 Hour Program. Mr. Viscasillas said during the meeting that he was very open to using the 640 Hour rule more frequently if that was appropriate. Mr. Viscasillas wanted them to look at that possibility and put together more specific guidelines. Someone at the meeting brought up Ms. Moffat as an example. Ms. Skilling said that they did not have enough information about Ms. Moffat to know if the 640 Hour rule applied. Ms. Skilling believed it was inappropriate to discuss Ms. Moffat until they knew more about the particulars. Mr. Viscasillas told them that it might be legal and appropriate to apply the 640 Hour Program to Ms. Moffat, but told Ms. Skilling to find out more information and get back to him regarding the specifics of the situation. Ms. Skilling did not have the necessary information regarding the Complainant at the time of the meeting to make a decision regarding her eligibility for participation in the 640 Hour Program.[3]

After the meeting with Mr. Viscasillas, Ms. Skilling looked up Ms. Moffat on the applicant tracking system and found that Ms. Moffat had failed to report for the March 1994 administration of the test. After further checking, she learned that the County apparently had overlooked Ms. Moffat's request for accommodations on her application and had not yet responded to the request. Ms. Skilling reviewed the material submitted previously regarding Ms. Moffat's accommodation request, Ms. Moffat's score on the 1993 test, her performance on the individual sections of the 1993 test, and the accommodations that had been previously provided. Ms. Ostby told Ms. Skilling that she had provided all of the accommodations that had been determined to be appropriate in administering Ms. Moffat the test in 1993, was not aware of any problems with that test administration, and had not heard anything since. Ms. Skilling noted that Ms. Moffat's primary problem on the 1993 test was the bookkeeping section. Since that section was not included on the 1994 test, Ms. Skilling believed that Ms. Moffat had a fairly good chance of doing well on the test.[4] In addition, since Ms. Moffat had been rehired by the County to work as a temporary account clerk and was still working in that position, Ms. Skilling assumed that Ms. Moffat could handle not only the reading that was required on the account clerk job but also the

lower level of reading that was reflected in the test items. Ms. Skilling became aware sometime in early April, 1994, that Ms. Moffat once dated Ms. Schmahl's son. Ms. Skilling did not consider this when deciding what accommodations to provide Ms. Moffat or when deciding whether Ms. Moffat was eligible for the 640 Hour Program.

Ms. Skilling held up the creation of a list of eligibles with respect to the 1994 test in order to give Ms. Moffat an opportunity to take the test. She also determined that there was no basis to use the 640 Hour Program for Ms. Moffat because a testing accommodation could, in fact, be made. Ms. Skilling contacted Ms. Moffat's supervisor, Penny Schmahl, about having Ms. Moffat take the test. One or two days later Ms. Skilling talked to Ms. Moffat and advised her that she was not a candidate for the 640 Hour alternative selection procedure because she was not unable to take the open, competitive test and to make arrangements to take the test. Ms. Skilling decided to afford Ms. Moffat the same accommodations on the 1994 test as in 1993. Ms. Moffat was informed of the accommodations that would be provided and was given a sample test to review in advance. Ms. Moffat was also told that there would be a customer service test (the "PDI test") measuring work habits, work reliability, and how well the applicant would get along with customers, co-workers, clients, and supervisors.[5]

Ms. Moffat took the office specialist battery on April 19, 1994, in a private room and was granted double the amount of time in which to take it Again, the test items themselves were not read to Complainant. Ms. Skilling, who administered the test to Ms. Moffat, offered to read the instructions to Ms. Moffat, but Ms. Moffat said that that was unnecessary since they were the same as those in the sample test provided to her. Ms. Skilling checked on Ms. Moffat a few times during the test and asked how she was doing. After Ms. Moffat completed the office specialist battery, she took the PDI test. Ms. Skilling offered to read the PDI test items to Ms. Moffat. Ms. Moffat looked at the test and said that the items were brief and she would not need it read. Ms. Skilling read the instructions to her, went through the sections with her, and told her that it was best to respond with her first impression. Ms. Moffat completed the PDI test and left it in Ms. Skilling's office.

Ms. Moffat received 70 out of 80 points on the office specialist battery. A passing score was 55. Applicants needed to score at least 75 points to be able to have an opportunity to be selected for an account clerk position. Ms. Moffat did not pass the PDI test. Her failure to pass the PDI test meant that she would not be entitled to further consideration for a permanent account clerk position. Ms. Skilling called Ms. Moffat to tell her the results of her testing and told her that she did reasonably well on the test. Ms. Skilling did not inform Ms. Moffat that she had failed the PDI test during the telephone conversation because Complainant started crying when told the results of the office specialist battery and Ms. Skilling did not want to hurt her further. Although Ms. Moffat's score could have been used to place her on some other lists that did not require the PDI test (such as intermediate clerk, cashier clerk, or station clerk), Ms. Moffat told Ms. Skilling that she was not interested in being considered for those positions.

On August 22, 1994, Complainant filed a charge with the Minnesota Department of Human Rights charging Hennepin County with refusing to provide a reasonable testing accommodation for Complainant's disability. A contested case hearing was held

in this matter beginning June 12, 1996 and lasted over the course of 21 days. At the close of Complainant's case in chief, Hennepin County brought a motion for summary judgment and/or directed verdict based on the doctrines of official and statutory (discretionary) immunity.

II. Legal Standard

Summary disposition is the administrative equivalent of summary judgment and the same standards apply. Minn. Rules, pt. 1400.5500(k). Summary judgment is appropriate if there is no genuine issue as to any material fact and if the moving party is entitled to judgment as a matter of law. Sauter v. Sauter, 70 N.W.2d 351, 353 (Minn. 1955); Louwagie v. Witco Chemical Corp., 378 N.W.2d 63, 66 (Minn. App. 1985); Minn. R. Civ. P. 56.03. The Office of Administrative Hearings has generally followed the summary judgment standards developed in judicial courts in considering motions for summary disposition regarding contested cases. See Minn. Rules pt. 1400.6600.

It is well established that, in order to successfully resist a motion for summary judgment, the non-moving party (here, the Complainant) must show that specific facts are in dispute which have a bearing on the outcome of the case. Hunt v. IBM Mid America Employees Federal Credit Union, 384 N.W.2d 853, 855 (Minn. 1986). The existence of a genuine issue of material fact must be established by the non-moving party by substantial evidence; general averments are not enough to meet the non-moving party's burden under Minn. R. Civ. P. 56.05. Id.; Murphy v. Country House, Inc., 307 Minn. 344, 351-52, 240 N.W.2d 507, 512 (1976); Carlisle v. City of Minneapolis, 437 N.W.2d 712, 715 (Minn. App. 1988). Summary judgment may be entered against the party who has the burden of proof at the hearing if that party fails to make a sufficient showing of the existence of an essential element of its case after adequate time to complete discovery. Id. To meet this burden, the party must offer "significant probative evidence" tending to support its claims. A mere showing that there is some "metaphysical doubt" as to material facts does not meet this burden. Id. The evidence presented to defeat a summary judgment motion, however, need not be in a form that would be admissible at trial. Carlisle, 437 N.W.2d at 715 (citing Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986)).

The non-moving party has the benefit of that view of the evidence which is most favorable to him or her, and all doubts and inferences must be resolved against the moving party. See, e.g., Celotex, 477 U.S. at 325; Thiele v. Stich, 425 N.W.2d 580, 583 (Minn. 1988); Greaton v. Enich, 185 N.W.2d 876, 878 (Minn. 1971); Thompson v. Campbell, 845 F.Supp. 665, 672 (D. Minn. 1994). If reasonable minds could differ as to the import of the evidence, judgment as a matter of law should not be granted. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-51 (1986).

III. Official Immunity

Official immunity is a common law doctrine which, in the absence of willful or malicious wrong, protects public officials who are charged with duties which call for the

exercise of judgment or discretion. Olson v. Ramsey County, 509 N.W.2d 368, 371 (Minn. 1993). Official immunity applies only in situations involving the act of an individual government employee. It is intended to protect public employees "from the fear of liability that might deter independent action and impair effective performance of their duties." Elwood v. County of Rice, 423 N.W.2d 671, 678 (Minn. 1988). Official immunity protects judgment exercised at the operational level rather than the policy making level, and it requires something more than ministerial duties. Olson v. Ramsey County, 509 N.W.2d at 371. An act is ministerial and not discretionary "when it is absolute, certain and imperative, involving merely the execution of a specific duty arising from fixed and designated facts." Rico v. State, 472 N.W.2d 100, 107 (Minn. 1991). Discretionary duties, on the other hand, call for the exercise of significant judgment and discretion. Elwood, 423 N.W.2d at 677.

Under recent Minnesota case law, official immunity is available as a defense to claims brought under the Minnesota Human Rights Act when the nature of the governmental duty at issue is discretionary and there is no evidence of malice. Beaulieu v. City of Mounds View, 518 N.W.2d 567, 571 (Minn. 1994). Discrimination claims based on the discretionary acts of an official who commits a willful or malicious wrong will not be barred by official immunity. Id. In determining whether an official has committed a malicious wrong, the court considers whether the official intentionally committed an act that she had reason to believe is prohibited. Id. "Malice" means nothing more than the intentional doing of a wrongful act without legal justification or excuse, or the willful violation of a known right. Rico, 472 N.W.2d at 107.

In analyzing any immunity question it is essential to identify the precise government conduct at issue. Olson v. Ramsey County, 509 N.W.2d at 371. The government conduct challenged in this case is Nancy Skilling's decisions regarding reasonable testing accommodations for Ms. Moffat. Specifically, Ms. Moffat is challenging Ms. Skilling's decision not to provide her with a reader for the written employment exam and not to allow her to participate in the alternative selection procedure known as the 640 Hour Program.

Hennepin County argues that Ms. Skilling's determination of what testing accommodations were appropriate was discretionary and therefore immune from liability because what constitutes a reasonable accommodation necessarily varies from case to case depending on the disability involved. Hennepin County maintains that there is no absolute, certain and appropriate accommodation that applies to every disability. In fact, Hennepin County points out that Complainant's own expert, Ms. Scherz-Busch, testified that there is no one particular profile of persons with dyslexia. Accordingly, Hennepin County argues that Ms. Skilling had to assess Ms. Moffat's disability and exercise judgment and discretion with respect to her accommodation request. Hennepin County further argues that the fact that the Minnesota Human Rights Act provides a list of possible accommodations supports a finding that decisions regarding accommodation requests are discretionary acts and not fixed ministerial functions. Minn. Stat. § 363.03, subd. 1(6).

Complainant argues that Ms. Skilling and Hennepin County are not entitled to official immunity or vicarious official immunity, respectively. Complainant maintains that

Ms. Skilling's decisions regarding testing accommodations were ministerial in nature and not discretionary. According to Complainant, Ms. Skilling's decision did not involve significant judgment and discretion. Rather, Ms. Skilling "merely needed to apply the law to the specific facts she had before her." In addition, even if Ms. Skilling's conduct did involve discretion, Complainant argues that Ms. Skilling violated clearly established law by denying Ms. Moffat a reader and the chance to participate in the 640 Hour Program. According to Complainant, "reading a written text is a common necessary accommodation for dyslexic individuals." (Complainant's Brief at 8.) Similarly, Minn. Stat. § 383B.31, which covers the duties of the director of the Hennepin County personnel board, requires that alternative selection procedures be used to measure the ability of persons whose handicaps are so severe that the usual selection process cannot adequately predict job performance. Therefore, Complainant contends that by denying Ms. Moffat a reader and the opportunity to participate in the 640 Hour Program, Ms. Skilling willfully discriminated against Ms. Moffat and is not entitled to official immunity.

Complainant also lists twenty-seven alleged instances of "malice, bad faith and willful or malicious wrongs" on the part of Hennepin County. In sum, Complainant maintains that Hennepin County, through Ms. Skilling, violated the Minnesota Human Rights Act by "failing to address" whether Ms. Moffat had a disability; by failing to determine what were reasonable and necessary accommodations; by allowing some "favored" disabled applicants to take part in the alternative 640 Hour Program based simply upon a statement of a clerical staff person while requiring Ms. Moffat to "prove" her disability and needs; by not adequately predicting Ms. Moffat's actual job performance; by forcing Ms. Moffat to take the written exam and refusing to read it to her; by falsely telling Ms. Moffat that she could not fail the PDI test; by falsely telling Moffat that she did "reasonably well" on the 1994 test; and by believing that reading the test to Ms. Moffat would have made no difference in her score.

Ms. Moffat can defeat Hennepin County's official immunity defense only if she can show that Ms. Skilling's conduct was ministerial and not discretionary; or that Ms. Skilling's conduct was discretionary but malicious. Absent a showing of malice, discretionary decisions are protected by official immunity. Given the variety of disabilities and the variety of accommodations that may or may not be appropriate, the decision to grant or deny a particular accommodation must necessarily involve the exercise of judgment and discretion. Based on all of the evidence presented, the Administrative Law Judge finds that Ms. Skilling's decisions involved significant judgment and discretion. There was ample evidence in the record to support findings that Ms. Skilling exercised discretion and judgment in the areas of determining testing accommodation and eligibility for the 640 Hour Program and that her decisions in these areas were not merely "ministerial." In making decisions regarding testing accommodation, it is evident that Ms. Skilling exercises discretion in considering what the test measures, what job class is involved, and how a particular disability will affect performance on the test. Ms. Skilling's overall goal is to try to make the system accessible but do so within the guidelines and rules that Hennepin County as a civil service agency must follow. Similarly, in making decisions regarding eligibility for the 640 Hour Program, Ms. Skilling balances the nature of the particular impairment; the severity level of the

impairment, especially as it impacts the test; the essential functions of the job and what the job entails; whether the test is job related; civil service requirements; supervisor's interests; the costs and risks when someone is brought into the 640 Hour Program; the county's commitment to trying to provide employment to persons with disabilities; and the impact on other applicants applying for a limited number of jobs in the county. Although the Director of Human Resources would theoretically have authority to overrule decisions made by psychologists regarding accommodations and eligibility for the 640 Hour Program, there is no evidence that that has happened on any occasion.

Official immunity thus applies unless Ms. Moffat has put forth evidence of malice on the part of Ms. Skilling. To establish malice, Complainant must show that Ms. Skilling's denial of Ms. Moffat's requests for certain testing accommodations was intentional and Ms. Skilling had reason to believe that her denial was legally prohibited. City of Mounds View, 518 N.W.2d at 572. That is, even if Ms. Moffat establishes that Nancy Skilling should have granted her better accommodations, such as providing her with a reader for the exam, Complainant must put forth evidence that Ms. Skilling's denial of Ms. Moffat's testing accommodation requests violated clearly established law and Ms. Skilling knew her actions were legally prohibited in order to defeat Respondent's official immunity defense. Id. at 571.

In Olson v. Ramsey County, 509 N.W.2d 368 (Minn. 1993), a trustee brought a wrongful death action against the county and a county social worker in connection with the death of a child who had been abused by his mother and was subject to a case management plan intended to prevent further abuse. The trustee alleged negligence in the formulation and implementation of the case management plan. The court found that the county social worker was entitled to official immunity for the formulation of the case plan. Although the court conceded that arguably the case plan could have provided for more or different kinds of contacts with the mother and her child, the court concluded that it is this kind of judicial second-guessing that official immunity protects against. Id. at 372. Justice Simonett succinctly explained that "governmental immunity protects against not only right decisions with unfortunate results but wrong decisions with bad results." Id.

The linchpin of qualified immunity is "objective reasonableness". Pinder v. Johnson, 54 F.3d 1169, 1173 (4th Cir.) (en banc), cert. denied, ___ U.S. ___, 116 S.Ct. 530 (1995), citing Anderson v. Creighton, 483 U.S. 635, 639 (1987). So long as the public officer's actions, viewed from the perspective of the officer at the time, can be seen within the range of reasonableness, then no liability will attach. Important to this reasonableness inquiry is whether the rights alleged to have been violated were clearly established at the time of the challenged actions. Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738 (1982). If the law supporting the allegedly violated rights was not clearly established, then immunity must lie. Where the law is clearly established, and where no reasonable public officer could believe he was acting in accordance with it, qualified immunity will not attach. Anderson, 483 U.S. at 640.

In this case, the law concerning the appropriate accommodations to be provided someone with a learning disability is not clearly established and is dependent upon the unique circumstances of the particular disability. Although Complainant argues, without

any support, that reading a written test is a "common necessary accommodation for dyslexic individuals", the necessity of such an accommodation is far from certain. In fact, EEOC Guidelines set forth at 29 CFR 1630.11 and the ADA Title I Manual 5.6 state that when the ability to read is the skill that the employment test purports to measure, providing a reader may not be a reasonable accommodation. Though not binding on the courts, EEOC Guidelines are a source of informed and persuasive interpretation by the enforcing administrative agency to which courts and litigants may properly resort for guidance. See General Electric Co., v. Gilbert, 429 U.S. 125, 141-42 (1976).

Furthermore, in Burke v. Commonwealth of Virginia, ___ F. Supp. ___, WL 494567 at 3 (E.D. Va. April 25, 1996), the U.S. District Court for the Eastern District of Virginia held that employment tests that may screen out persons with disabilities are lawful if the tests measure ability to perform the position sought. In Burke, a correctional officer candidate with a mild form of dyslexia complained that the Virginia Department of Corrections failed to provide testing for the correctional officer position in a manner accessible to persons with disabilities. The plaintiff was subjected to tests that measured whether he was competent to read and comprehend written materials. Despite being re-tested twice, the plaintiff did not receive a passing grade and ultimately was not certified. The court found that, pursuant to ADA regulations, the Department's tests were lawful because they measured skills consistent with the published list of abilities required for the position of a correctional officer. Id. at 3; 29 CFR § 1630.10.

Based on all of the evidence and the arguments of counsel, the Administrative Law Judge finds that Complainant has not met her burden of establishing malice on the part of Ms. Skilling. The record is replete with information supporting a conclusion that Ms. Skilling proceeded in good faith to make determinations regarding appropriate testing accommodation and eligibility with respect to Complainant. There was substantial evidence that Ms. Skilling determined that the 1993 and 1994 tests measured essential functions of the account clerk job and were valid and reliable testing instruments. Extensive evidence was offered during trial relating to the development of the tests administered to Complainant in 1993 and 1994, the validity and reliability of the tests, and the standardized administration of the tests. Ms. Skilling developed these tests based on job studies that included information obtained from both incumbent employees and supervisors regarding what knowledge, skills, abilities, and personal characteristics were necessary for successful performance of the account clerk job (and, with respect to the 1994 test, other clerical jobs as well).

Supervisors whom Ms. Skilling consulted as subject matter experts in developing the tests told her that reading was very much a part of the account clerk job and that account clerks are expected to be able to do reading independently, without the involvement of their supervisors. Ms. Skilling has determined as a result of job studies that the account clerk job frequently involves looking at fairly detailed information and reviewing considerable text material on the screen. These job studies revealed that account clerks spend about 80 percent of their time visually processing and reading documents. There was evidence that a large number of documents are processed by account clerks each day. Ms. Schmahl, a witness generally favorable to the Complainant, told Ms. Skilling that account clerks review approximately 200 documents each day. Based upon an analysis of the reading levels used in the 1993 and 1994 tests and comparison with the reading

levels of sample documents used by account clerks in performing their jobs, Ms. Skilling determined that the reading level required on the job was higher than the reading level reflected in the tests.[6]

Ms. Skilling sought feedback from testing clerks and supervisors following the tests, examined "split half" consistency, and used other methods to monitor the tests after their development in order to ensure that they were valid, reliable, and adhered to professional standards of practice. Ms. Skilling has computed the reliability of the test battery used in 1993 several times, using a standard item analysis program available in her office. Reliability ranges from 0 to 1 (with 1 being a perfect measurement; i.e., an applicant will get the same score if he or she takes the test again soon thereafter). The overall written reliability of the test taken by Ms. Moffat in 1993 (based on 667 people taking the test) is .95, which is very high. The reliability of the individual sections of the 1993 test ranged from .8 to .96. Ms. Skilling has also computed the validity of the test battery used in 1993. Based on a correlation of the test scores and performance ratings of 42 people who took the test and were hired, there is a validity coefficient of .39. This outcome means that the content validity of the 1993 test is good. Discussions with supervisors have also validated the subject matter of the test. Ms. Skilling has determined that the overall reliability of the 1994 test is .91 (based on a sample size of 1352). The reliability of the Reading Comprehension section is .81. Based on feedback from supervisors, the education and experience of applicants, and how well successful applicants eventually perform the job, Ms. Skilling has determined that the 1994 test has content validity which she believes is in the same range as that of the 1993 test.

It is particularly appropriate to find that malice has not been established where what constitutes a reasonable accommodation for a person with dyslexia is not well defined in the law. Pursuant to the EEOC Guidelines interpreting the ADA, Ms. Skilling's decision to deny Ms. Moffat's request to have the exam read to her when reading comprehension was being measured is within the "range of reasonableness" and was not legally prohibited. 29 C.F.R. § 1630.10. It was within the range of reasonableness for Ms. Skilling to conclude, based on the information she gathered and analyzed, that the ability to read and visually process written documents unaided was an essential function of the job, and that the test items should not be read to Complainant. Given the fact that higher reading levels were required of account clerks on the job, it was also within the range of reasonableness for Ms. Skilling to conclude that a temporary employee who had been satisfactorily performing the duties of an account clerk could handle the level of reading on the tests. Likewise, Ms. Skilling's denial of Ms. Moffat's request to participate in the 640 Hour Program is within the range of reasonableness, especially when the severity of Ms. Moffat's disability is greatly disputed by the experts who testified in this matter.

Therefore, Complainant has failed to establish that Ms. Skilling intentionally committed an act that she had reason to believe was legally prohibited. Accordingly, no malice has been shown and Ms. Skilling's conduct is protected by official immunity.

If a government employee has official immunity, it may be extended vicariously to the employer but whether it is extended is a policy question to be determined on a case

by case basis. Pletan v. Gaines, 494 N.W.2d 38, 42 (Minn. 1992). Nancy Skilling is not a named respondent in this proceeding. Respondent argues that because Ms. Moffat's claims against Hennepin County rest solely on the actions of Ms. Skilling, official immunity should be vicariously extended to Hennepin County. In Olson v. Ramsey County, 509 N.W.2d at 372, the court extended the official immunity of a county social worker to the county. To deny vicarious immunity to the governmental employer would, according to the court, focus "stifling attention on the [employee's] performance to the serious detriment of that performance." Likewise, in Watson v. MTC, ___ N.W.2d ___, (Minn. August 29, 1996), the Minnesota Supreme Court extended official immunity to MTC for the decisions made by its bus driver during an emergency situation (assault on bus). Citing Pletan, 494 N.W.2d at 42, the court stated that it would be "anomalous to impose liability on the MTC for the very same acts which [the bus driver] receives immunity." Id.

Complainant maintains that official immunity does not exist in this case and may not be vicariously extended to Hennepin County because Ms. Skilling engaged in malicious and willful misconduct. Complainant cites to Dewars v. City of Princeton, 1995 WL 747884 (Minn. App. 1994) (unpublished), where the court refused to extend vicarious official immunity to a city employer where the city, by its employees, was found to have engaged in intentional acts of reprisal against the plaintiff. According to Complainant, Hennepin County should likewise be denied vicarious official immunity where Ms. Skilling willfully violated clearly established law in denying Ms. Moffat certain testing accommodations.

The Judge finds that Hennepin County is entitled to vicarious official immunity. In S.L.D. v. Kranz, 498 N.W.2d 47, 51 (Minn. App. 1993), the Court of Appeals held that government employers should vicariously enjoy their employee's official immunity whenever "the threat of liability against the government would unduly influence government employees from exercising independent judgment in pursuit of legitimate public policy choices." The Judge agrees with Respondent that such policy concerns support extending vicarious official immunity to Hennepin County in this case. Absent such an extension, the threat of liability against the County would focus stifling attention on Ms. Skilling's decision-making ability to the detriment of her work performance. In addition, as explained in Pletan and Watson, it would be anomalous to impose liability on Hennepin County for the very acts for which Ms. Skilling receives immunity. Complainant's citation to Dewars is not applicable where the Judge has determined that no evidence of intentional wrong doing on the part of Ms. Skilling has been presented.

IV. Statutory (Discretionary) Immunity

Finally, Hennepin County argues that it is also entitled to the defense of statutory (discretionary) immunity. Minn. Stat. § 466.03, subd. 6 (1994) immunizes government entities from tort liability for "any claim based upon the performance or failure to perform a discretionary function or duty whether or not the discretion is abused." Generally, this immunity protects only governmental conduct at the planning or policy making level. Conduct at the operational level is not protected by discretionary immunity. Olson v. Ramsey County, 509 N.W.2d at 371. The type of discretion referred to in discretionary function immunity is much more narrow than the discretion involved in a government

employee's common law official immunity. Nusbaum v. Blue Earth County, 422 N.W.2d 713, 719 (Minn. 1988). Determining whether the discretionary function immunity applies depends on whether the challenged governmental action involves a balancing of policy with political, economic, and social considerations or, whether it involved merely a professional or scientific judgment. Id. at 720. If a governmental decision involves the type of political, social and economic considerations that lie at the center of discretionary action, including consideration of safety issues, financial burdens, and possible legal consequences, it is not the role of the court to second-guess such policy decisions. Steinke v. City of Andover, 525 N.W.2d 173, 176 (Minn. 1994). Government conduct is protected by the discretionary function immunity only where the state produces evidence that the challenged conduct was of a policy making nature. In other words, statutory (discretionary) immunity bars challenges to the policy itself not challenges to the government's conduct pursuant to the policy or failure to comply with the policy. Nusbaum, 422 N.W.2d at 721.

Hennepin County argues that it is protected by statutory or discretionary function immunity because Ms. Skilling's decisions regarding accommodations necessarily involve balancing policy objectives at the planning level. In making her decision, Ms. Skilling had to consider the requirements of the Human Rights Act and the ADA and the extent of Ms. Moffat's disability, all in the context of the administering the testing accommodation program. In support of its argument, Hennepin County cites Oslin v. State, 543 N.W.2d 408, 416 (Minn. App. 1996), where the court held that a state treatment center's investigation and disciplinary decisions regarding sexual harassment complaints involved policy making considerations and therefore the decisions were protected by statutory (discretionary) immunity. In Oslin, the court noted that the center's management had to consider a number of competing concerns such as the importance of maintaining a workplace free of sexual harassment, deterring future misconduct, avoiding unnecessary work disruption, and minimizing the risk and expense of potential litigation. Id. at 416. The court concluded that the treatment center's decisions did not simply require the application of professional judgment to a given set of facts but were necessarily entwined in a layer of policy making. Id.

Likewise, in Johnson v. State of Minnesota, ___ N.W.2d ___, (Minn. August 29, 1996), the court recently held that the state was protected by statutory (discretionary) immunity for its alleged failure to determine whether a parolee on supervised release status had arrived at his assigned halfway house. The parents of a woman murdered by the parolee brought an action against the State, Hennepin County and the halfway house alleging, among other things, that the defendants were negligent in allowing parolees to arrange their own transportation to the halfway house. The court recognized that numerous policy making considerations such as the safety of the public, the parolee's rehabilitation and treatment needs, and the parolee's reintegration into the community were balanced in establishing the terms and conditions of the parolee's release. The court therefore ruled that the supervised release program involves complex policy choices requiring protection from judicial second-guessing by statutory immunity. Id.

Complainant argues that Ms. Skilling's decisions regarding what testing accommodations to provide Ms. Moffat involved only operational decisions which are

not entitled to discretionary immunity. Complainant contends that the facts of this case are more similar to those presented in Olson v. Ramsey County, 509 N.W.2d at 371. In Olson, the Minnesota Supreme Court held that a county was not entitled to statutory (discretionary) immunity for its social worker's formulation of a case plan tailored to a client's specific needs and circumstances. The social worker's decisions in formulating the case plan were determined to be operational level decisions and not policy making decisions. Id. (The social worker was, however, entitled to official immunity for her formulation of the case plan.) Complainant argues that, like Olson, Ms. Skilling's reasonable testing accommodation decisions did not involve balancing policy objectives. Rather, Ms. Skilling's decisions were operational and specific to Ms. Moffat's particular circumstances. Therefore, according to Complainant, statutory (discretionary) immunity should not apply.

Statutory (discretionary) immunity protects governmental conduct at the planning or policy making level, while conduct at the operational level is not protected. Nusbaum, 422 N.W.2d at 720-22. However, as the court noted in Olson, there is not always a sharp distinction between "making" and "implementing" policy. Id. at 371. In the instant case, Complainant is contesting the accommodation determinations Ms. Skilling made and not the manner in which she carried them out. Therefore, Complainant seems to be challenging Respondent's policy making decisions and not its operational functions. Given this, the facts of this case appear to be more like Oslin than Olson. Ms. Skilling's determinations regarding what testing accommodations to provide Ms. Moffat involved balancing a variety of complex policy objectives and competing interests involving employee qualifications and the requirements of the Minnesota Human Rights Act and applicable civil service laws. Given this, the Judge finds that Respondent is entitled to protection by statutory (discretionary) immunity for Ms. Skilling's decisions regarding appropriate testing accommodations.

In summary, Ms. Moffat has failed to put forth evidence that Ms. Skilling's denial of her testing accommodation requests was unreasonable and that Ms. Skilling knowingly violated clearly established law. Consequently, absent any evidence of malice, Ms. Skilling is entitled to official immunity for her reasonable and discretionary decisions and Hennepin County is entitled to vicarious official immunity. Furthermore, Hennepin County is also entitled to statutory (discretionary) immunity as Ms. Skilling's determinations necessarily involved the balancing of complex policy considerations. Therefore, Hennepin County's motion for summary judgment based on official and statutory (discretionary) immunity is granted and Ms. Moffat's complaint is dismissed in its entirety.

B.L.N.

[1] Ms. Skilling has a B.S. in psychology and an M.S. in industrial organizational psychology from Iowa State University, and has concluded all coursework toward a Ph.D. in industrial/organizational psychology, psychometrics, and applied statistics. Prior to her employment with Hennepin County, she had experience in psychometrics, research on test development, research design and analysis, conducting job analyses, conducting interviews with employees, and developing job descriptions. She has also taught courses at the

University of Minnesota and at Iowa State in entry level psychology, educational psychology, measurement labs, and industrial organizational psychology relating to personnel selection and measurement. **Ex. R-25**.

[2] The test administered to Ms. Moffat in 1993 was designed specifically for Hennepin County accounting classifications (account clerks and intermediate account clerks). The test administered to Ms. Moffat in 1994, the "Office Specialist Battery," was developed as part of a new broader approach under which applicants for a variety of clerical classifications took a single test battery.

[3] Mr. Ramnaraine's notes regarding this meeting state "Ref. A. Moffat--ok to do it if it's legal." Ex. 13. Ms. Skilling denied that Mr. Viscasillas made that statement during the meeting and testified as set forth above regarding the import of the meeting. No one else present at the meeting was called as a witness by either party. There was consistent evidence that psychologists were given the discretion to make decisions regarding eligibility for the 640 Hour Program. Under these circumstances, the Judge is not convinced that Mr. Viscasillas in any way ordered at the April 6 meeting that Ms. Moffat be considered eligible to participate in the 640 Hour Program.

[4] The Bookkeeping section was dropped from the 1994 based on conversations with supervisors who said they could give up that section if it was necessary to shorten the test. Although the data collected by Ms. Skilling indicated that candidates needed bookkeeping knowledge on entry into the job, that particular section was difficult for applicants overall and supervisors said that they could live without it. In addition, Hennepin County wanted to put together a test that could be used across all categories of clerical employees. Supervisors who consented to the elimination of the bookkeeping section did indicate, however, that they wanted the test to measure reading comprehension.

[5] Ms. Skilling decided to use the PDI Employment Inventory because she learned during a 1989-90 job study she conducted that customer service skills were very important on the job. The approach used previously (structured interviews before a panel of supervisors to assess customer service and interpersonal skills) was a very labor intensive approach and was not feasible for a large number of applicants. Ms. Skilling selected the PDI test as the most reliable and sound in its development. For the first six months, the County used the PDI test simultaneously with a structured interview. When Ms. Skilling compared the results, she saw that supervisors' observations were consistent with the PDI test. The PDI test is written at a sixth or seventh grade reading level. Because the PDI test does not measure ability to read, Ms. Skilling would read it to an applicant if that was a requested accommodation. Ms. Skilling established a "fail point" on the PDI test based on data collected during pilot phase, the PDI test manual, the PDI implementation guide, and discussions with George Paajanen of PDI. The County stopped using the PDI test in December, 1994, due to the cost of administration, and now uses a video-based test.

[6] A recent analysis conducted by Ms. Skilling of a sample of documents used by account clerks revealed a readability level from the 6th grade to the 15th grade level (the latter level being very rare). The sample included documents obtained from the Accounts Payable Department in Hennepin County. In 1989, Ms. Skilling took a random sample of supervisors across the County who supervised account clerks and obtained sample documents read by account clerks. She has analyzed the readability level of documents read by account clerks periodically since that time and has determined that the level has remained consistent, based upon the types of documents used in the job and feedback from supervisors. The reading level of the bookkeeping section of the 1993 test was also set at a level that was lower than that required on the job. The readability level of the Reading Comprehension section of the 1994 test has been analyzed by Ms. Skilling on several occasions. Passage A has an eleventh grade reading level (54 Flesch Reading Ease); Passage B has a seventh grade reading level (67 Flesch Reading Ease); Passage C has a ninth grade reading level (58 Flesch Reading Ease); and Passage D has a seventh grade reading level (65 Flesch Reading Ease). Ms. Moffat missed none of the five items set forth in Passage A, one of the four items in Passage B, one of the four items in Passage C, and three of the seven items in Passage D.